

	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
)	
UNITED STATES OF AMERICA	)	APPELLEE RESPONSE TO GOVERNMENT
	)	MOTION FOR ADDITIONAL STAY OF
	)	DECISION
		CASE No. 08-004
v.)	
	)	Interlocutory Appeal from the
	)	19 November 2008 Ruling of the Military
MOHAMMED JAWAD	)	Judge on the Defense
	)	Motion to Suppress Out-of-Court Statements
	)	By the Accused Made
	)	While in U.S. Custody, D-021
)	
	)	Presiding Military Judge
	)	Colonel Stephen R. Henley
)	
)	

**TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF
MILITARY COMMISSION REVIEW**

COMES NOW Appellee, in response to the government motion for an “additional stay of decision.” Appellee respectfully opposes the government’s motion. This response is filed timely pursuant to Court of Military Commission Review Rule of Practice (C.MC.R.R.P.) Rule 20(c) in that it is filed within five days after receipt of the government motion.

BURDEN OF PROOF

To the extent that the court has the power to continue to stay its decision, a proposition the defense disputes, the burden of persuasion rests entirely with the government to demonstrate that a continuance, particularly of the length requested, is in the interests of justice, and that the interests of the government outweigh the interests of the Appellee and the public in a prompt determination of this appeal.

ARGUMENT

The government's motion for an additional stay of 120 days is unsupported by any compelling justification, is contrary to the interests of justice and would cause significant prejudice to Appellee. This appeal has already caused a delay of over six months in Appellee's quest for justice and very likely delayed his return to Afghanistan and his freedom from illegal detention, which has now continued for over six and a half years. The government's asserted need for a delay is a result of their own lack of diligence in complying with the Executive Order to reach a prompt disposition of the Appellee's case. If the government believes it is necessary to prevent this decision from being issued, they can simply withdraw the appeal or, they can (once again) withdraw the charges against Mr. Jawad.¹ The government has simply failed to diligently pursue their review of Mr. Jawad's case, the second oldest, and by far the simplest, case on the military commission's docket. Thus, whatever equities may have tilted the scales in favor of granting the original stay request in the early days of the new administration no longer exist. The government should not be rewarded with another excessively lengthy and unwarranted delay when they have failed to devote the appropriate resources to determining the resolution of this case during the exceedingly generous delay granted by this Court the first time.

¹ As Appellee has noted previously, based on the unambiguous withdrawal of the original charge in this case by the Convening Authority on 17 December 2008, after ruling D-021 was announced, this Court lacks jurisdiction to rule on this appeal, and the appeal should have been dismissed on that basis months ago. If the Court believes that the withdrawal and re-referral on 8 January 2009, did not have the legal effect that a withdrawal and new referral normally has to deprive the appellate court of jurisdiction, the Court should promptly rule on the merits of the appeal. To the extent that the Court believes that the trial judge is in a better position to evaluate this issue, the Court should promptly remand the case to the trial judge for further proceedings.

Facts

In response to the government's factual assertions:

a. It is agreed that the inter-agency review was tasked with determining as promptly as possible the appropriate disposition of detainees. Appellee vigorously disputes that the government has complied with the Executive Order (E.O.) with respect to Appellee as evidenced by the fact that no disposition has been reached.

b. Agreed.

c. Agreed

d. Agreed. However, it is interesting to note that the government has continued to press forward in the case of U.S. v. Ali Hamza al Bahlul.²

e. Agreed.

f. The respondent has no information upon which to evaluate this statement. The respondent does not know what it means to be "under active consideration" by one of the Task Force's Detainee Review Teams. Counsels for Appellee have repeatedly requested a meeting with the Detainee Review Task Force reviewing Mr. Jawad's case and these requests have gone unanswered. The defense was given a suggested deadline of 15 April 2009 to submit written matters to the Task Force for their consideration, and the defense met this deadline. No members of the Review Team have been identified. No indication has been provided as to when the review will be completed or when the recommendation to the "principals" will be made, nor is there any deadline indicated for the "principals" to make a decision once the recommendation has been made. While the E.O. did direct the Secretary of Defense to take steps sufficient to

² Mr. al Bahlul is represented by Major Frakt, lead counsel for Appellee. During the suspension period, the Legal Advisor has recommended that the Convening Authority take final action to approve Mr. al Bahlul's findings and sentence.

ensure that proceedings in the CMCR are halted, the Court is not bound by the E.O. to comply with this request. As the Court noted in granting the original stay request, the request is simply a motion, which can be granted or denied as the Court sees fit. What other steps the government might take if this motion is denied is purely speculative and is not a relevant consideration for this Court.

g. Appellee accepts the factual assertions in these paragraphs, but asserts that they are irrelevant to this matter.

h. Agreed.

i. While the Appellee does not dispute this assertion, it is unclear to Appellee what impact the changes would have on proceedings which have already occurred.

j. Speculative and irrelevant.

k. Appellee agrees that the Government does not know “precisely how the military commissions will be reformed, or even what the disposition of the Appellee will be, including whether he will be tried by military commission.” Appellee is not in a position to know whether his review has been completed but agrees that he has not been informed of any decision about his future. The Detention Policy Review is supposed to be separate and distinct from the Detainee Task Force Review.

Additional Facts

Appellee incorporates the facts from the 26 January 2009 Response to the Government’s original request for a continuance filed with this Court, and adds the following facts relevant to consideration of this particular motion:

1. Mohammed Jawad was taken into U.S. custody on 17 December 2002 and has been held continuously since that date. He arrived at Guantanamo on 6 February 2003. During his detention, as specifically found by the military commission,³ he has been subjected to a variety of cruel, abusive and inhumane conditions and treatment, which have caused, and continue to cause, Mr. Jawad great suffering.

2. In the over six and a half years that he has been held by the U.S., Mr. Jawad has never had any meaningful opportunity to challenge the basis for his detention. He has never been determined to be an unlawful enemy combatant. The determinations that he was an “enemy combatant” by the Combatant Status Review Tribunal and subsequent Administrative Review Boards were based, in significant part, on the self-incriminating statements determined by Judge Henley to have been the product of torture.

3. Although it is true that the District Court denied the government’s motion to dismiss Mr. Jawad’s habeas corpus petition, the District Court has indicated that it will very likely grant a stay if the commission resumes.⁴ More importantly, the government continues to rely on the statements suppressed by Judge Henley in Rulings D-021 and D-022 in the habeas corpus litigation as the factual justification for continuing to detain Mr. Jawad. The DOJ has asserted that rulings of the military commission have no precedential value in U.S. District Court. The DOJ has also cited the fact that the government has appealed Ruling D-021 to this court as the basis for its continued reliance on the statements to U.S. interrogators at the Forward Operating Base on the night of Mr. Jawad’s capture on 17 December 2002. Thus, the government is unfairly utilizing the stay granted by this court to gain an advantage in the habeas litigation. Trial on the merits on the habeas petition appears to be months away despite the diligent efforts

³ See, e.g. Ruling D-008.

⁴ Major Frakt, lead counsel for Appellee, is also co-counsel on the habeas petition for Mr. Jawad.

of counsel for Appellee. In fact, the government has recently sought an additional delay of several months to comply with the District Court's Order to turn over exculpatory evidence from the files of the DOJ's Detainee Review Task Force.

4. Under the Rules for Military Commission 707(a)(2) the accused has a right to a speedy trial. Specifically, the members must be assembled within 120 days of the service of charges, not including certain excludable periods of delay. The charges were originally referred to trial on 30 January 2008, and were served on Mr. Jawad at that time. Needless to say, the commission was not assembled within 120 days. In fact, nearly 480 days have now passed, four times the 120 day limit, since the original date of service.

5. At the time the government's notice of appeal was filed on 24 November 2008, an "alien unlawful enemy combatant hearing" to determine whether the government could establish personal jurisdiction over the accused was scheduled for 8-12 December 2008 and, assuming the government could establish jurisdiction, trial on the merits was scheduled to commence on 5 January 2009.

Discussion

A. IT WOULD BE AN ABUSE OF THE COURT'S DISCRETION TO STAY ITS DECISION FOR AN ADDITIONAL 120 DAYS

Pursuant to Rule 22(c) of the Rules of Practice for the United States Court of Military Commission Review, interlocutory appeals "will ordinarily be decided within 30 calendar days after oral argument or filing of briefs, whichever is later, unless the Chief Judge grants an extension of time." This rule was designed to give the Chief Judge the authority to grant a panel

of the CMCR extra time to issue a decision in an extraordinarily complex case or if the panel members were overburdened with other commitments. It was not designed as a tool for the government to delay the issuance of a ruling on a case that the panel has decided. Although the Chief Judge has previously determined that he has the authority to extend the time within which the Court may decide matters, this power cannot be unlimited and must not permit the Chief Judge to simply withhold a ruling that the Court has already made (or is prepared to make within the normal time period) at the request of the government for reasons totally unrelated either to the ability of the Court to render an opinion in a timely manner or to the merits of the case.

To the extent that the Court has the power to grant a continuance, it must be based on a “particularized showing of necessity” in an individual case (see CMCR Rule 21(d)), not a general need to determine the fate of the entire Guantanamo population and resolve weighty national security policy issues. No such individualized showing has been made in this case.

B. IT IS CONTRARY TO THE INTERESTS OF JUSTICE TO FURTHER DELAY RULING ON THIS APPEAL AND DELAY WILL RESULT IN SIGNIFICANT PREJUDICE TO APPELLEE

In the CMCRs ruling granting the original stay, the Court noted that Mr. Jawad was being held not simply in pretrial confinement but also as an enemy combatant, and therefore suggested that “Actual prejudice related to delay of trial in this case is less compelling than it first might appear.” What the Court seemed to be suggesting is that because Mr. Jawad was being held as an enemy combatant and not merely in pretrial confinement, there was no guarantee that Mr. Jawad would be released even if the charges were dismissed, or if trial were to proceed and Mr. Jawad were to be acquitted. While Appellee acknowledges that the previous administration took the position that an enemy combatant could be held indefinitely even if acquitted by military

commission or even after completing a sentence imposed by military commission, in practice this has not occurred.

Where the Appellee can demonstrate that a stay of proceedings will likely result in a longer period of confinement, actual prejudice is clearly shown. There is a very strong likelihood that the 240 day delay requested by the government will result in longer total confinement for Mr. Jawad, even if he is ultimately convicted by military commission. While there are few precedents upon which to draw from in the delay-plagued military commissions, Mr. Salim Hamdan provides an illustration of the most likely scenario. Mr. Hamdan was convicted and sentenced on August 7, 2008. He received a 66 month sentence and was granted 61 months credit for time served in pretrial confinement. He was transferred to his home country of Yemen on November 26, 2008, 111 days after the sentence was announced, and released on January 13, 2009, 157 days after his sentence was announced. Thus, the 240 day delay being sought in this case is considerably longer than the time it took Mr. Hamdan to go from being a detainee to being a convicted prisoner to being a free man.⁵ Given the extraordinary mitigating circumstances in the case, there is every reason to believe, in the extremely unlikely event that Mr. Jawad were to be convicted in a military commission, he would be sentenced to no more than time served. It is certainly unlikely that he would receive a sentence greater than Mr. Hamdan, particularly since he has already been held in U.S. custody for 78 months. Indeed, had Mr. Jawad's trial been held on 5 January 2009, as scheduled prior to this interlocutory appeal, and had he received a comparable sentence to Mr. Hamdan (five months after credit for time served), and had the government treated Mr. Jawad as they did Mr.

⁵ Similarly, David Hicks was sentenced, pursuant to a pretrial agreement, to a nine month sentence of confinement on March 31, 2007. He was returned to his home country of Australia to serve the remainder of his sentence on May 20, 2007, 50 days later, and released from prison in Australia on 29 December 2007, 273 days later. All told, Mr. Hicks was in U.S. custody for 65 months, considerably less than the 78 months Mr. Jawad has already been detained by the U.S..

Hamdan, he would already be a free man. Thus, Mr. Jawad has already suffered actual prejudice from the first stay of proceedings. Extending the stay another four months will only compound this prejudice. In short, any delay in his case is potentially delaying his return to Afghanistan and ultimately his freedom.

Besides the denial of freedom, the delay can cause a second form of prejudice. Mr. Jawad's defense becomes more impaired with each delay. Mr. Jawad's has been diagnosed with PTSD. Further incarceration and uncertainty about his future will likely exacerbate his condition, and could potentially interfere with his ability to assist counsel in his defense. The events that are the subject of the charges occurred over six and a half years ago. Over this period of time, memories have faded, and key witnesses and pieces of evidence have already disappeared. At least one key witness is reportedly now too old to travel. Recreating the events of December 17, 2002 becomes more and more difficult for the defense with each passing month.⁶

As noted in our previous objection to the proposed delay back in January, the MCA provides for a speedy trial right of 120 days. The government has made a complete mockery of this right. Charges were preferred in October 2007. The charges were referred to trial on January 30, 2008, and Mr. Jawad was arraigned in March 2008. All objective observers recognized that the case against him was on life support even before the suppression rulings were issued. The military judge had rejected the government's entire theory of the case (that mere unlawful combatancy violated the law of war, see Ruling D-007) and suggested to the prosecution in open session that they had an ethical obligation to voluntarily dismiss. The government sought reconsideration of this ruling and was denied again. The charges would very

⁶ Appellee notes that while Secretary of Defense ordered discovery to continue during the suspension period, the defense has not received a single additional item of discovery during this time.

likely have been dismissed for lack of jurisdiction at the hearing scheduled for December 2008, had the government not filed this interlocutory appeal. At this point, the government is merely trying to buy time. A stay request interposed for purposes of delay violates Appellee's right to a Speedy Trial.

The government's explanation of their need for this Court to delay issuing its opinion is unpersuasive. In essence, the government states that because they have no idea how or if they plan to proceed in this case or other pending cases and in what forum and under what rules, and because the Administration desires to "preserve the status quo" while they make these decisions this Court should withhold issuing a ruling on an issue that was briefed, argued and (presumably) decided, in January of this year.⁷ While the Appellee recognizes that the Administration is faced with a host of complicated legal issues surrounding the disposition of Guantanamo detainees, Appellee submits that the outcome of this appeal is unrelated to any of the complex decisions with which the government is grappling. When the original stay request was made, the CMCR was understandably sympathetic to the circumstances faced by the incoming Administration, and, in weighing the relative equities of the situation, the Court gave great deference to the wishes of the Executive Branch and the new Commander-in-Chief. After squandering the original 120-day delay, the equities no longer favor the government. In the view of Appellee, in granting the original stay request, the Court strained to stretch CMCR Rule 22(c) (which was intended to allow the Chief Judge to give panels of the court more time to issue opinions when time was needed to complete the decision) to encompass requests for the Court to simply sit on decisions that have already been reached. The government now requests this Court to stretch that rule beyond the breaking point.

⁷ At the oral argument on January 13, 2009, the Chief Judge indicated that he expected to decide the issue in a conference with the panel immediately after the close of oral argument.

The government has re-offered the same vague and conclusory statements about the potential prejudice to the government, and the possibility that a ruling would “necessitate re-litigation of issues in the case” or “produce legal consequences affecting the options available to the Administration.” In its ruling granting the original stay request, this Court indicated skepticism about this explanation, stating “it is not at all clear that a prompt resolution of the preceding interlocutory motion would in any way prejudice an on-going Interagency review.” Despite this clear signal of the Court’s skepticism, the government has once again failed to provide any concrete examples of what adverse impact issuing the ruling might have on the government. In Appellant’s view, if the government has not decided whether to proceed with the prosecution of Mr. Jawad, then the issuance of the ruling can only be helpful to them as they weigh their options going forward. What the government has also failed to explain is what difference it would make to any of the issues being confronted by the government if the Court issued its opinion on 17 September 2009 as opposed to 20 May 2009. Appellee concedes that the fact that the government is now seeking to change the rules in midstream might necessitate re-litigation of issues, but this will be true regardless of when the Court issues the opinion. The mere passage of time will not change the consequences of the Court’s ruling.

The government has not identified any real “interest of justice” that would be served by delaying issuance of a ruling on this appeal for an additional four months. Permitting the President and his Administration to complete “a thorough review of all pending cases and of the military commissions process as a whole” is not a legitimate reason to delay this particular ruling in this particular case. Not surprisingly, the government has not cited a single case in support of its motion. Like so many issues in this case, this request is truly unprecedented in the annals of American jurisprudence.

Ultimately, debating the potential consequences of the ruling is merely an exercise in speculation. What is not speculative is the impact a further delay will have on Appellant. It is critical that we not lose sight of the fact that we are dealing with a human being, not simply a pawn in a grand political chessgame. This human being, Mohammed Jawad, captured as a teenage boy, has been detained now for over six and a half years, deprived of contact with his family and homeland, subjected to highly abusive conditions of confinement, and denied the program of social and psychological rehabilitation and reintegration guaranteed to him by the Optional Protocol for the Involvement of Children in Armed Conflict. Every day of Mohammed Jawad's stultifyingly monotonous life is filled with anxiety, gnawing uncertainty and desperation. It is hard to imagine the emotional roller coaster ride that he has been on for the past year. Every time it appears that progress is being made in the case, there has been some new setback or delay. When the lead prosecutor resigned and publicly proclaimed Jawad's probable innocence, he quite reasonably thought the charges would be dismissed. When Judge Henley rejected the government's theory of the case and the government admitted they had no evidence to prove an element of the case, Mr. Jawad once again thought the case was over. When Judge Henley sided with Mr. Jawad and ruled that the sole self-incriminating statements the government was seeking to introduce were the product of torture, he was certain that the case could not go on. When the Convening Authority announced that she would not refer charges to trial of detainees who had been tortured, Mr. Jawad assumed that his charges would be dropped as well. When President Obama took office and announced the closure of Guantanamo and the suspension of the commissions, he thought the charges would be dismissed and began to believe, for the first time in years, that he would be released. Each time Mr. Jawad's hopes have been raised, they have been dashed by some new gambit by the prosecution or change of direction by

the administration. These crushing disappointments have taken a cumulative toll on Mr. Jawad and pushed him nearly to the breaking point. How many more setbacks can this young man endure? The government's suggestion that not only is it not prejudicial to Mr. Jawad but actually is in the interests of Mr. Jawad to grant the stay is unsupported, outrageous and incredibly presumptuous. Every extra day spent in legal limbo in Guantanamo is prejudicial to Mr. Jawad.

Conclusion

The interests of justice are clear in this case. Appellant has singularly failed to meet its high burden to justify another four month delay. The Court of Military Commissions Review exists for one reason, to rule on matters of law that arise in military commissions. With all due respect to the Court, it is time to do your job. The Government's Motion for an Additional Stay should be denied and the opinion of the Court on the merits of the appeal issued forthwith.


Request for Oral Argument

Pursuant to CMCR Rule 17, because of the unique and critically important issues presented in this motion, if the Court is not prepared to deny the Government's motion solely on the briefs, Appellee requests oral argument on an expedited basis the week of 25-29 May 2009, on the following issue:

Is it in the best interests of justice to delay the issuance of the ruling on the merits of this appeal until September 17, 2009?

Respectfully Submitted,


By: DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

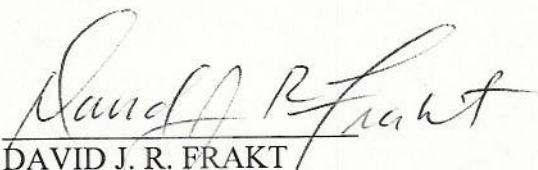

And: KATHARINE DOXAKIS, LCDR, JAGC, USN
Assistant Defense Counsel

//signed//

And: ERIC MONTALVO, MAJ, USMC
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Ste 2000E
Washington, DC 20005
(202) 761-0133, ext. 106

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to this Court and LCDR Arthur
Gaston, Trial Counsel, on 19 May 2009.


DAVID J. R. FRAKT
Major, USAFR
Defense Counsel
Dated: 19 May 2009